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IN THE

Supreme Court of the United States

October Term, 1973

No. 73-1539

ART NEON CO., et al.,
Petitioners,

vs.

THE CITY AND COUNTY OF DENVER, et al.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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INDEX

Page

Opinions Below 1

Jurisdiction 2

Question Presented 2

Statement of the Case 2

Reasons for Granting the Writ

I. An Important Question of Federal Law Which Has Not Been But Should Be Decided by This Court Is Present in This Case 7

II. The Court of Appeals Has Decided a Federal Question in Conflict with Applicable Decisions of This Court 11

Conclusion 13

TABLE OF AUTHORITIES

Cases

Almota Farmers Elevators Warehouse Co. v. United States, 409 U.S. 470 11

Baltimore v. Mano Swartz, 299 A.2d 828 8

Buchanan v. Warley, 245 U.S. 60, 74 (1917) 9

City of Akron v. Chapman, 116 N.E.2d 697 8

City of Corpus Christi v. Allen, 254 S.W.2d 759 8

City of Los Angeles v. Gage, 274 P.2d 34 8

E. B. Elliott Adv. Co. v. Metropolitan Dade County, 425 F.2d 1141 (5th Circ. 1970) 10

Grant v. City of Baltimore, 129 A.2d 363 8

Page

Hoffman v. Kinealey, 389 S.W.2d 745 9

Jones v. City of Los Angeles, 294 P. 14 8

Livingston Rock and Gravel Co. v. County of Los Angeles, 272 P. 2d 4 8

Lynch v. United States, 292 U.S. 571 9

National Advertising Co. v. County of Monterey, 464 P.2d 33 8

National Board of YMCA v. United States, 395 U.S. 85, 92 (1969) 9

O'Connor v. City of Moscow, 202 P. 2d 401 8

Olson v. United States of America, 292 U.S. 246 12

Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 12

State ex. rel. Dema Realty Co. v. McDonald, 121 So. 613 8

United States v. Dickinson, 331 U.S. 745 12

United States v. Miller, 317 U.S. 369 12

Federal Statutes

23 U.S.C. §131 10

28 U.S.C. §1254(1) 2

28 U.S.C. §1331(a) 3

42 U.S.C. §1983 9

Other Authorities

Revised Municipal Code of the City and County of Denver, §613.5-5(4) 2-3

Appendix 11

IN THE

Supreme Court of the United States

October Term, 1973

No. _____

ART NEON CO., et al.,
Petitioners,

vs.

THE CITY AND COUNTY OF DENVER, et al.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered in this matter on November 29, 1973, and to which a Petition For Rehearing was denied January 17, 1974.

OPINIONS BELOW

The judgment of the Court of Appeals of November 29, 1973 which is herein sought to be reviewed is reported at 488 F.2d 118 and is reprinted in separate appendix to this Petition, p. 15. The opinion of the United States

District Court for the District of Colorado entered on April 4, 1973, is reported at 357 F.Supp. 466 and is also reproduced in the appendix at p. 27.

JURISDICTION

The judgment of the Court of Appeals was entered on November 29, 1973. Petition For Rehearing was timely filed and was denied on January 17, 1974. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

QUESTION PRESENTED

When the lawful use, enjoyment, and ownership of private property is made unlawful and nonconforming by amendment of zoning ordinances, may the zoning authority also require the destruction of such property without payment of just compensation to the owner?

CONSTITUTIONAL AND ORDINANCE PROVISIONS INVOLVED

This case involves that portion of the Fifth Amendment to the Constitution of the United States which provides as follows:

> "... nor shall private property be taken for public use without just compensation."

This case further involves §613.5-5(4) Revised Municipal Code of the City and County of Denver, which is reduced verbatim at p. 17 of the appendix as it is contained in the opinion of the United States District Court at 357 F.Supp. 466, 469, 470.

STATEMENT OF THE CASE

The jurisdiction of the United States District Court was

originally invoked in this case pursuant to 28 U.S.C. §1331(a). This was a suit brought by four Denver area electric sign companies and four businessmen attacking, among other things, the validity of §613.5-5(4) of the Revised Municipal Code of the City and County of Denver. An additional business entity intervened in this suit during its pendency. Disputed sections of the ordinance will be referred to herein as the "sign code," and in essence, said ordinances require destruction of all nonconforming sign uses within the City and County of Denver. A "nonconforming use" is a use which is not a permitted use by any after-enacted ordinance. What was lawful and conforming becomes unlawful and nonconforming upon passage of such ordinances by the municipal legislative body.

The "sign code" was enacted on March 19, 1971 and requires that all sign uses made nonconforming by the passage of the ordinance be terminated. This ordinance made in excess of 70 percent of all Denver signs nonconforming. The crux of the controversy involved the requirement of destruction of nonconforming uses by a theory known as "amortization." The theory of "amortization" is simply that the owner of the "nonconformance" is given a certain amount of time in which to continue to maintain the nonconformance. At the expiration of the designated time, he must destroy his use and give up his property without compensation. The municipality takes the position that the time period allowed to continue the nonconformance is not the equivalent to compensation to the owner for the destruction of his property. The taking and destruction of nonconformances is decreed in accordance with a schedule based on replacement cost of the use in question under the Denver ordinance scheme. Any use which costs

the following amount to replace was terminated in the following time:

Replacement Cost	Time Before Destruction
$ 0 - $ 3,000.00	2 Years
$ 3,001 - $ 6,000.00	3 Years
$ 6,001 - $15,000.00	4 Years
$15,001 or over	5 Years

In addition, the ordinance terminated all uses with changing light effects, revolving, or rotating features within thirty (30) days after the passage of the ordinance on March 19, 1971!

The Evidence

Petitioners produced evidence that proved that the signs which they had built, owned, and serviced prior to the passage of the ordinance on March 19, 1971, were all erected pursuant to a permit issued by the City and County of Denver, for which a fee was paid (Vol. I-A, pp. 17-18). Each of the uses in question were lawful, permitted uses at the time of passage of the Denver sign ordinance; and Petitioners had, in reliance on prior ordinances, invested large sums of money. Most signs in Denver are leased for periods of time varying from 3 to 10 years, although many were owned by individual businessmen (Vol. I-A, p. 19). Most of the owners of signs were not yet touched by the provisions of the ordinance at the time of trial and appeal. The lessor sign companies ordinarily made a small profit during the initial lease period (usually 5 years), but the real profit was derived from renewal (Vol. I-A, p. 21). The lessee gets a better lease rate during the renewal period, thus giving him an incentive to renew, and raising some

proprietary interest in the original lease term (Vol. I-A pp. 21-22). The trial court found as a fact that these non-conforming signs were not adaptable for use elsewhere, that salvage value does not equate removal costs, thus the "sign code" destroyed property without any possible usage thereafter.

Signs were not detrimental to public safety and the trial court so found. The City produced expert opinion evidence to justify the "sign code" on an environmental basis. This expert, Stuart L. Udall, former Secretary of the Interior, testified that the City of Denver could eliminate signs immediately by paying just compensation or in a period of time by allowing a sufficient period of "amortization"! (Vol. III-B, pp. 16, 17, 18.) Evidence further showed that Petitioners lawfully invested substantial sums of money in the manufacture and erection of signs and in the leasing of signs, and the trial court so found. The court also found that market value of the lessees' businesses would be diminished if the signs were removed; and as to most of the signs involved, the ordinances prohibited any use, rather than merely restricting the type or extent of use of the signs. The evidence further showed that there was no relationship between replacement costs and unexpired leasehold terms and further showed that the remaining life of the signs in question extended far beyond the allowable time for "amortization" (Vol. I-B, pp. 9, 10). It was undisputed that "amortization" deprived Petitioners of valuable years of future use of income-producing property (Vol. II, pp. 113-117). The evidence also showed that Petitioner sign companies and the business entity Petitioners who leased their signs had established contractual relationships exceeding the term of the time allowed by the ordinance for termination; thus as an adjunct to the issues, the ordinance in

question impaired the obligation of thousands of contracts (Vol. I-B, pp. 121, 122). Petitioners established that the economic loss vested upon them by the application of the ordinance exceeded $1,450,000.00 (Vol. II, p. 126). In the City and County of Denver alone there are thousands of nonconforming uses involving many different kinds of property. Signs are but one small segment of nonconforming use property. The evidence showed generally that the "sign code" was enacted to promote aesthetic considerations and had no relationship to the public health, safety, morality, or general welfare.

The Rulings Below

The United States District Court ruled (357 F.Supp. 466; appendix p. 15) that the ordinances in question were violative of the protections of the Fifth Amendment of the Constitution of the United States and were unconstitutional. The trial court found that the Denver ordinances attempted to accomplish a taking of property without payment of just compensation and further concluded that the scheme for termination for nonconforming uses involving different time periods based on replacement costs was likewise invalid, but generally concluded that the theory of "amortization" was proper in principle. The court held that Denver could terminate nonconformances by "amortization" and that if the "amortization" period was reasonable in length, it was a form of payment of just compensation. The court then proceeded to determine as a fact based on the evidence that the City's scheme for sign destruction did not justly compensate Petitioners in this case, or in other words, the periods of time involved were not sufficient just compensation.

The United States Court of Appeals for the Tenth Circuit

reversed. This court agreed with the trial judge that the varying periods of time allowed keyed to replacement costs were improper. This court held, however, contrary to the trial court's finding of fact, that the five year amortization was reasonable and did not rule on whether or not the amortization was a taking of Petitioner's property without just compensation. The Court of Appeals further expressly held that the thirty (30) day destruction of the revolving, rotating, and changing light effect uses was valid and overturned the trial court's express finding of fact that there was no relationship of these signs to traffic safety.

REASONS FOR GRANTING THE WRIT

I.

AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN BUT SHOULD BE DECIDED BY THIS COURT IS PRESENT IN THIS CASE.

The validity of the radical new theory of "amortization" as the equivalent of the "just compensation" provided by the Fifth Amendment of the United States Constitution should be reviewed by this Court. The elimination of nonconformances has long been a cherished goal of zoners and planners throughout the United States. As municipal governmental structures proliferate, the pressure to cause the citizenry to conform to what is deemed proper and good and wise by the municipal legislative body and their professional staff is vastly increased. The zoning and planning zealots have long searched for a methodology to impose their aesthetic views upon the inhabitants of the municipality, but, due to cost and priorities of allocation of public tax funds, have been unable to give practical effect to their desires. The amortization scheme has recently come to the forefront of the municipal horizon, and promises to be a

total panacea for the problems of the zoners and planners. The beauty of "amortization" in their view is that it will eliminate the nonconformance without cost. The economic loss under this scheme must be borne wholly by the owner of the nonconformance.

The approval of "amortization" by the courts has to date been mostly in the area of noxious nuisance oriented uses such as junkyards, rendering plants, and concrete plants. *City of Los Angeles vs. Gage*, 274 P.2d 34; *Livingston Rock and Gravel Co. vs. County of Los Angeles*, 272 P.2d 4; *State ex. rel. Dema Realty Co. vs. McDonald*, 121 So. 613. There are also numerous contrary decisions holding termination of nonconformances invalid. *City of Akron vs. Chapman*, 116 N.E.2d 697 (junkyard); *City of Corpus Christi vs. Allen*, 254 S.W.2d 759 (auto wrecking yard); *Jones vs. City of Los Angeles*, 294 P. 14 (nursing home); and *O'Connor vs. City of Moscow*, 202 P.2d 401 (pool hall). The most recent applications of amortization have been in the area of signs.

Signs do not find a great deal of favor among environmentalists, but only the business community seems to favor their use. The vast majority of court decisions involve billboards or so-called third party advertising. *Grant v. City of Baltimore*, 129 A.2d 363; *National Advertising Co. v. County of Monterey*, 464 P.2d 33. The present case involves on-premise electric business identification signs. This is one of the few cases involving such ordinances, although a few have been heard. *Baltimore v. Mano Swartz*, 299 A.2d 828.

As one might expect in the evolution of a new theory, the cases have proceeded from elimination of noxious uses, to elimination of near-nuisances, to elimination of bill-

boards, to elimination of on-premises business identification signs, to the result in this case, to-wit: A municipality may eliminate any nonconforming use without payment of compensation! The right of citizens to use a specific nonconformance, whatever it may be, is taken by the sign code, and the continued use of their property in a certain fashion is prohibited.

The right to use property as a constitutionally protected right has been repeatedly affirmed by this Court. *Buchanan vs. Warley,* 245 U.S. 60, 74 (1917); *National Board of YMCA vs. United States,* 395 U.S. 85, 92 (1969). The acquisition, enjoyment and alienation of property are basic rights under 42 U.S.C. 1983 (Civil Rights Act). Valid contracts are property which is protected by the Fifth Amendment. *Lynch v. United States,* 292 U.S. 571.

The justification for amortization is allegedly based in the police power; however, it seems difficult to reconcile the destruction of property only after varying periods of time, from two to five years on this theory. If police power permits destruction of private property without just compensation, then surely it may be done immediately. The leading case to date on the subject expressed this philosophy in voiding an amortization ordinance. *Hoffman v. Kinealey,* 389 S.W.2d 745. This case contains a collection of most of the existing authority on the subject of amortization. The court there reasoned that implicit in the amortization technique itself is the proposition that by the expedient of postponing the taking, objectionable unconstitutionality is overcome. This court adopted the stance that it would be a strange and novel doctrine indeed which would approve a municipality taking private property for public use without compensation so long as it was not too valuable and the taking not too soon.

The trial judge treated this case as a Fifth Amendment case and determined that there was an uncompensated taking. The Court of Appeals completely ignored the Fifth Amendment problems and said the ordinance was reasonable. The opinion is merely a social treatise showing the court's view of signs. The opinion is wrong and is a tragedy for the owners of private property everywhere.

The federal courts have not really considered the subject of amortization prior to this case. It was briefly mentioned in the case of *E. B. Elliott Adv. Co. v. Metropolitan Dade County*, 425 F.2d 1141 (5th Circ. 1970), but the instant case is the only head-on decision on the subject in the federal courts. The Congress of the United States considered this general subject before passage of 23 U.S.C. §131 (Highway Beautification Act), but concluded that just compensation for billboard removal was a necessity. A plan for such payment is included in the Act. Petitioners submit that if this court waits for a conflict in circuits or delays decision of this controversy, then hundreds of millions of dollars in value of private property will be destroyed and the rights of the owners of that property will be terminated forever. Future decision of this controversy will not help these property owners.

There are now in excess of seven hundred municipalities which have virtually copied the Denver Sign Code. This is not a state-by-state problem, but is national in scope; it involves all nonconforming property. We submit that this court should determine whether or not amortization is or is not a taking of private property for a public use without just compensation.

II.

THE COURT OF APPEALS HAS DECIDED A FEDERAL QUESTION IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT.

The decision of the Court of Appeals, that amortization of any nonconforming use is reasonable and does not require compensation, ignores all previous decisions of this Court. The Court of Appeals observed that the case of *Almota Farmers Elevator & Warehouse Co. v. United States,* 409 U.S. 470, was not helpful because it related to eminent domain. This case was one of the keystones of the decision of the trial judge who is an eminent scholar on this subject. This shows the great disparity in approach to this case by the judges who considered the issues here. Under the opinion of the Court of Appeals, it will be necessary for each new municipal legislative effort to eliminate some supposedly undesirable use without cost to be brought before the Circuit Court for its approval or disapproval as to "reasonableness." Will "reasonableness" depend upon whether or not the object to be eliminated is environmentally acceptable or whether it appeals to the court? The "reasonableness" test imposed by the Court of Appeals has no standards. It will not assist the municipal legislative body to know to what lengths they may go in legislating away citizens' rights, nor will it help those whose property is eliminated. The observations of the Circuit Court, that the amortization is part of an over-all zoning plan thus it is reasonable, are not helpful. How is decision of the question of whether or not an ordinance takes property without just compensation or is a lawful exercise of the police power aided by statements that the ordinance is part of an over-all zoning plan? Would an ordinance prohibiting free speech be made valid if it was included in a zoning plan?

The sign code destroys signs based on "replacement cost." It does not consider market value or future useful life. The property of Petitioners here was useful and had substantial useful life beyond the periods allowed. If the reasoning of the Court of Appeals is permitted to stand, then one may erect a sign with a valid permit for which one paid a fee and have that sign destroyed 30 days later. One may erect a sign which can be made nonconforming at the next meeting of the municipal legislative body. The decisions of this court do not approve the decision of the Court of Appeals here. *United States vs. Dickinson,* 331 W. 745; *Olson vs. United States of America,* 292 U.S. 246; *United States vs. Miller,* 317 U.S. 369.

Justice Holmes, in *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393, observed:

> ". . . The protection of private property in the Fifth Amendment . . . provides that it shall not be taken for [public] use without compensation . . . . When this seemingly absolute protection is found to be qualified by the police power, the natural tendency of nature is to extend the qualification more and more until at last private property disappears. But that cannot be accomplished in this way under the Constitution of the United States . . . .
>
> *"We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."* (Emphasis supplied.)

On either ground hereinbefore stated, the Court of Ap-

peals' decision is wrong and should be reviewed by this Court because of the national implications involved.

CONCLUSION

WHEREFORE, Petitioners respectfully pray that a writ of certiorari be granted.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 73-1404 — NOVEMBER 1973 TERM

ART NEON CO., ADVANCE NEON CO., EPCON, INC., GORDON NEON CO., MLG CORP., d/b/a Mini-Rates Rent-A-Car, MICHAEL T. THOMASE, d/b/a Colonial Manor Motel, RITE-LITE SUPPLY CO., and SUPER DRUG CO.,

Appellees,

vs.

THE CITY AND COUNTY OF DENVER, a municipal corporation, and ANTHONY H. JANSEN,

Appellants,

GUMP GLASS CO.,

Intervenor-Appellee.

Appeal From The United States District Court For The District of Colorado (D.C. # C-3427)

Earl T. Thrasher, Denver, Colorado (Max P. Zall, and Robert M. Kelly, Denver, Colorado, with him on the Brief), for Appellants.

Alan A. Armour, of Hoffman, Goldstein, Armour & Lonnquist, P.C., Denver, Colorado, for Appellees.

Davis, Graham & Stubbs, Denver, Colorado, and Gibson, Dunn & Crutcher, Los Angeles, California, on the Brief for Amicus Curiae, Combined Communications Corporation.

Before SETH and DOYLE, Circuit Judges, and TALBOT SMITH, District Judge*.

SETH, Circuit Judge.

The City and County of Denver, Colorado, and Anthony H. Jansen, the defendants, appeal from the judgment of the United States District Court for the District of Colorado, which held that portions of the Denver Municipal Code relating to zoning, and more particularly to nonconforming signs, violate the Fifth Amendment of the United States Constitution. Enforcement of the provisions was enjoined. The action was commenced by Art Neon Co., other sign companies, and retail businesses seeking to have portions of the zoning ordinance declared invalid.

Denver is a municipal corporation organized as a "home rule" city, and defendant, Anthony H. Jansen, is the City Zoning Administrator charged with the enforcement of the zoning ordinances, of which Denver Rev. Mun. Code § 613 (1971), the "Permitted Signs" section with which we are here concerned, is a part.

Plaintiffs-appellees, Art Neon Co., Advance Neon Co., Gordon Neon Co., and Epcon, Inc. are engaged in fabricating, installing, repairing, leasing, and selling neon, steel, and plastic signs and other advertising displays in Denver. Other appellees are owners or operators of businesses in Denver which lease and have had installed on their premises outdoor advertising signs from appellee sign companies and others. Two appellees own their own signs.

It is apparent from the foregoing that the appellees are connected in a variety of ways with "outdoor advertising,"

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*Of the Eastern District of Michigan, sitting by designation.

and direct their attack on provisions for termination of nonconforming signs in the "Permitted Signs" section of Denver's Zoning Ordinance, Rev. Mun. Code § 613 (1971), and particularly sections 613.5-.5(4) and .5(4)(a) thereof, which provide:

".5-4. Termination of Non-Conforming Signs.

* * * * *

".5-5(4). By Amortization. The right to maintain a non-conforming sign shall terminate in accordance with the following schedule:

Any sign which on the date the sign became non-conforming would cost the following amount to replace:	Shall be terminated within the following period after the sign became non-conforming:
$0 to $3,000	2 years
3,001 to 6,000	3 years
6,001 to 15,000	4 years
15,001 or more	5 years

".5-5(4)(a). The right to maintain a flashing, blinking, fluctuating, animated or portable sign shall terminate within 30 days after such sign became non-conforming."

It appears that the effective date of the "Permitted Signs" section of Denver's Zoning Ordinance was March 19, 1971, and that thereafter the appellees' outdoor advertising signs became, in varying respects, "nonconforming." They commenced this suit asserting that the "Permitted Signs" section was in violation of various provisions of the United States Constitution, including Article I, § 10 (impairment

of the obligation of contracts), Amendment V (deprivation of property without due process of law and taking of private property for public use without compensation), Amendment I (restriction on freedom of expression), and Amendment XIV, § 1 (deprivation of equal protection of the laws and of property without due process of law).

After considering whether to abstain from hearing the case, and instead to allow the courts of the state of Colorado to first pass on the claims presented, the district court decided to hear only one issue. This was:

> "Whether the requirement that certain existing signs owned by plaintiffs be terminated over the periods prescribed by the ordinance is a valid exercise of the municipal police power or an unconstitutional taking of private property without compensation having been made therefor; or is an unconstitutional impairment of the obligation of certain contracts relating to the leasing of signs owned by plaintiffs." 357 F.Supp. at 467.

The district court, relying on United Mine Workers v. Gibbs, 383 U.S. 715, and Reetz v. Bozanich, 397 U.S. 82, declined to exercise pendent jurisdiction over the state law claims and held that these "myriad problems should be left for state court determination." 357 F.Supp. at 467. As to the issue above stated, the trial court held ". . . that the present Denver ordinance does not provide for the payment of just compensation." The court further ruled that the provisions relating to nonconforming signs were in violation of the Fifth Amendment and enjoined enforcement.

The zoning control sought to be exercised by Denver over signs is through a classification according to types which may be displayed in various zoning districts. Signs

are not prohibited, but a close limitation is placed on the types permitted. The provision of the ordinance which is in issue is a part of a city wide zoning plan under which the typical property use controls are established. There is no doubt that a general zoning ordinance may be enacted by the City of Denver. Such ordinances are a proper exercise of the police power. Village of Euclid v. Ambler Realty Co., 272 U.S. 365; Gorieb v. Fox, 274 U.S. 603; Green v. Castle Concrete Co., 509 P.2d 588 (Colo.).

As to the scope of police power generally, the Court in Berman v. Parker, 348 U.S. 26, said:

> ". . . An attempt to define [the police power's] reach or trace its outer limits is fruitless, for each case must turn on its own facts . . .
>
> "Public safety, public health, morality, peace and quiet, law and order — these are some of the more conspicuous examples of the traditional application of the police power to municipal affairs. Yet they merely illustrate the scope of the power and do not delimit it."

Zoning ordinances, including provisions relating to signs, are basically prospective in their application, and this aspect presents no serious problems today. However, there are usually nonconforming uses which present substantial problems. These uses are necessarily inconsistent with the purposes of zoning, Wasinger v. Miller, 388 P.2d 250 (Colo.), and are not intended to be perpetual. Thus there usually comes a time when such exceptions are sought to be ended. These terminations are in further exercise of the police power, and are sought to be accomplished in several ways. See City of Los Angeles v. Gage, 274 P.2d 34 (Cal.).

The ordinance here requires that nonconforming signs must be removed or brought into conformance within a specified period of time after they become nonconforming. This is referred to as "amortization," but in reality it is no more than notice to the owner and user of the sign that they have a period of time to make whatever adjustments or other arrangements they can. This is probably not a proper use of the word "amortization," and so used it contains no connotation of compensation or a requirement therefor. This method is generally regarded as a proper exercise of the police power, although there are strong opinions to the contrary. Some of the more recent cases which have considered the issue include E. B. Elliott Advertising Co. v. Metropolitan Dade County, 425 F.2d 1141 (5th Cir.); Markham Advertising Co. v. Washington, 439 P.2d 248 (Wash.).

The decision to terminate nonconforming uses, and the method to be used, is made by the appropriate legislative body. It is reached by a comparison or balancing of the burden or loss which will be placed on the individual by the ordinance with the public good sought to be achieved. See Hadacheck v. Sebastian, 239 U.S. 394; Board of Supervisors v. Miller, 170 N.W.2d 358 (Iowa). Such a legislative decision under the police power is prima facie a valid factual determination. The parties attacking such an ordinance have to meet a heavy burden. See Green v. Castle Concrete Co., 509 P.2d 588, and Board of County Comm'rs v. Simmons, 494 P.2d 85 (Colo.).

It is obvious that in the balancing process some loss or burden will fall on a sign owner or user. It is not required that the nonconforming property concerned have no value at the termination date. The plan need not be so constructed. The many and varied valid exercises of police

power in other areas so demonstrate the impact on the individual. See Goldblatt v. Hempstead, 369 U.S. 590; United States v. Central Eureka Mining Co., 357 U.S. 155; Hadacheck v. Sebastian, 239 U.S. 394; Mugler v. Kansas, 123 U.S. 623. The legislative determination must only meet the test of "reasonableness," that is, the plan for termination must be "reasonable." Standard Oil Co. v. Marysville, 279 U.S. 582; National Advertising Co. v. Monterey, 464 P.2d 33 (Cal.). This is not a test of concept of "just compensation." The Court in United States v. Central Eureka Mining Co., 357 U.S. 155, said: "[T]he mere fact that the regulation deprives the property owner of the most profitable use of his property is not necessarily enough to establish the owner's right to compensation." And further in Miller v. Schoene, 276 U.S. 272: "[W]here the public interest is involved preferment of that interest over the property interest of the individual, to the extent of its destruction, is one of the distinguishing characteristics of every exercise of the police power which affects property."

In the application of the reasonableness test to the legislative determination, the courts have used a variety of factors, and combinations thereof. These include the nature of the nonconforming use, the character of the structure, the location, what part of the individual's total business is concerned, the time periods, salvage, depreciation for income tax purposes, and depreciation for other purposes, and the monopoly or advantage, if any, resulting from the fact that similar new structures are prohibited in the same area. Where signs are concerned, the courts usually also mention the fact that the use is also of public streets since the message is directed to the passerby.

When these factors are applied to the portion of the Denver ordinance here concerned, we must conclude that it is

basically reasonable. The "amortization" method has been established by the authorities as a proper method to terminate nonconforming uses. It is clearly applicable to signs and is an aspect of the balancing of the public good against individual harm as part of the city's overall zoning plan and ordinance.

In this connection, the opinion in St. Louis Poster Advertising Co. v. St. Louis, 249 U.S. 269, is very significant. The ordinance there concerned regulated the size and location of billboards. Reliance was therein placed on Cusack Co. v. Chicago, 242 U.S. 526, which dealt with an outright prohibition of billboards "in residence districts of a city," 242 U.S. at 530, rather than a city wide regulation as in the case at bar. But the St. Louis case in permitting the full scope of the ordinance leads us to also hold that the Denver "Permitted Signs" ordinance, City and County of Denver, Rev. Mun. Code §§ 613.5-5(4) and 5(4)(a) (1971), is a valid, reasonable, nonarbitrary, and nondiscriminatory enactment under that city's police powers. It does not deprive the users of advertising signs, whether they be lessees or owners, of such use. It does not force the concerns which manufacture and supply such signs to terminate their businesses. It does, however, closely regulate the types of signs which may be used and, as we have held, this is proper.

There is, however, a portion of the ordinance which we cannot hold to be reasonable. This is the provision for different periods of amortization for signs having different "replacement" costs measured at the date they become nonconforming. The plaintiffs have attacked the validity of these categories. The replacement cost of the signs is not related to any of the relevant factors in the reasonableness tests, and presents no valid basis for different treatment of

different signs ranging from three to five years. It has no bearing on the landowner's problem, nor on the sign owners' situation nor on the city's position. The most that can be said for replacement cost is that it could indicate, as of the date used, the size or complexity of a sign, but this is no real help. When the categories so constructed are removed, we are left with the five-year maximum period for removal of all nonconforming signs in the ordinance, and this period, as we have stated, is a valid one. The ordinance with the remaining five-year time limit is thus valid.

The ordinance contains a special category (.5-5(4)(a)) which states in part: "The right to maintain a flashing, blinking, fluctuating, animated, or portable sign shall terminate within 30 days after such sign became non-conforming." This we hold to also be a reasonable regulation. The balancing relates to such signs in a somewhat different way in that the apparent movement created by the sign can be stopped and the signs brought into conformity without destroying entirely the usefulness of the sign. Certainly its effectiveness is much diminished, and its value reduced, but when this is compared to the extreme character of these signs, with the demonstrated relationship to safety, we must hold the method and the time to be reasonable.

The matter of preemption by the Federal Highway Beautification Act, 23 U.S.C. § 131, or by the Colorado Highway Sign Act, Colo. Rev. Stat. § 120-5-28, has been argued by the parties, but we find no such preemption. Nor do we find therein any example or standard binding in any way on the city.

The parties have also discussed the case of Almota Farmers Elevator & Warehouse Co. v. United States, 409 U.S. 470, as it relates to improvements on leaseholds. The Court

in its opinion states the issue therein decided concerns valuations in eminent domain proceedings. The case is very significant in that field, but in our view of the legal concepts here involved, it is not helpful.

On the impairment of contracts issue urged by the plaintiffs, the question is addressed to a legitimate end and the measures taken are reasonable and appropriate to that end. Home Building & Loan Ass'n v. Blaisdell, 290 U.S. 398. As the opinion of the Court pointed out in the same case:

> ". . . [W]here the protective power of the State is exercised in a manner otherwise appropriate in the regulation of a business it is no objection that the performance of existing contracts may be frustrated by the prohibition of injurious practices.
>
> * * * * *
>
> "In all such cases the question becomes, therefore, one of reasonableness, and of that the legislature is primarily the judge."

We have already held that the ordinance is a reasonable one in other aspects, and it does not, under Article I, § 10(1) of the United States Constitution, impair the obligation of contracts.

Much has been written about the distinctions between governmental acts which are within the police power and those which are within just compensation requirements under eminent domain. It will not serve any useful purpose to add to the literature on the subject. Like so many subjects, it makes some difference where you start into the problem or where you get hold of it initially. The section here challenged is part of the city's zoning ordinance, and is part of the aim or purpose of zoning. It is not much different from

the provisions prohibiting changes in nonconforming structures, or prohibitions against use if once discontinued, and similar limitations on the use of property. These prohibitions are also an established part of zoning and generally upheld. Zoning from its inception has been grounded as a legislative function on the police power, and has been so sustained by the courts. The particular issue before us of elimination of nonconforming uses is well within an overall zoning plan which is not challenged, and the legislative body has decided it is an essential part thereof. It is of general application under a plan adjusted to different conditions in each zone, and not directed to particular tracts or signs. It is a bona fide use restriction. The challenged provision does not prohibit the use of signs, but requires conformance to specified types in specified places. Further in view of the traditional place where such regulations are found, the fact this subject is an integral part of zoning to accomplish its legitimate purposes, and the broad nature of its application leads us to place the issue in the police power category and not in eminent domain as the trial court apparently did.

The judgment of the trial court is REVERSED, and the case is REMANDED for further proceedings in accordance with this opinion.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

ART NEON CO., ADVANCE NEON CO., EPCON, INC., GORDON NEON CO., MLG CORP., d/b/a Mini-Rates Rent-A-Car, MICHAEL T. THOMASE, d/b/a Colonial Manor Motel, RITE-LITE SUPPLY CO., and SUPER DRUG CO.,

Plaintiffs,

vs.

THE CITY AND COUNTY OF DENVER, a municipal corporation, and ANTHONY H. JANSEN,

Defendants,

and

GUMP GLASS CO.,

Intervenor.

CIVIL ACTION NO. C-3427

Hoffman, Goldstein & Armour, by Alan A. Armour, Attorney at law, Denver, Colorado, for Plaintiffs and Intervenor; Max P. Zall, City Attorney, and Earl T. Thrasher, Assistant City Attorney, Denver, Colorado, for Defendants; Lawrence A. Wright, Jr., Richard F. Mauro, and Howard B. Gelt, Attorneys at law, Denver, Colorado, for Amici Curiae Consumers; and Davis, Graham & Stubbs, by Richard P. Holme, Attorney at law, Denver, Colorado, and Gibson, Dunn and Crutcher, by Theodore B. Olson, Attorney at law, Los Angeles, California, for Amicus Curiae Combined Communications Corporation.

MEMORANDUM OPINION

WINNER, Judge

Following submission of comprehensive pretrial briefs, this case was tried to the Court. Thereafter, long post trial briefs were filed, and the case is ready for determination by this opinion which contains the findings and conclusions required by Rule 52.

Plaintiffs' complaint makes a hydra-headed attack on the validity and constitutionality of the sign code of the City and County of Denver. [Revised Municipal Code, Sec. 613, and, more particularly, Sec. 613.5 of the Code.] Some of plaintiffs' claims raise questions we deem to arise only under the Constitution of the United States; some argue provisions of both state and federal constitutions, while others are directed at case law and the Constitution of the State of Colorado. By order of March 24, 1973, the Court limited the issues it would try to those arising only under the Constitution of the United States, and, although plaintiffs urged that there is pendent jurisdiction to try other claims, we ruled that under the principles of *United Mine Workers v. Gibbs* (1966) 383 U.S. 715, and *Reetz v. Bozanich* (1970) 397 U.S. 82, myriad problems should be left for state court determination. We accepted the following phraseology by the city of the question the Court should determine:

> "Whether the requirement that certain existing signs owned by plaintiffs be terminated over the periods prescribed by the ordinance is a valid exercise of the municipal police power or an unconstitutional taking of private property without compensation having been made therefore; or is an unconstitutional impairment of the obligation

of certain contracts relating to the leasing of signs owned by plaintiffs."

By supplementary order of July 18, 1972, it was explained that included within the issues which might be determined was "the question of equal protection as that question applies to the differing amortization periods [contained in the ordinance]."

Thus, the constitutional question we today decide is important, but the question decided is narrow, and many of plaintiff's challenges of the ordinance are not resolved.[1] Perhaps we should mention a few of the many things we do not decide.

(1) The city says that some of the signs exist under revocable permit to use city-owned property. We decide nothing having to do with this contention of the city nor do we decide anything arising under plaintiffs' claim that the city is estopped to enforce revocability of any permits. This is a problem for the state courts.

(2) The city says that a sign of Michael T. Thomase, d/b/a Colonial Motel exists under a special dispensation and that it is not affected. We make no determination concerning this.

(3) The right of the city to prohibit the erection of any or all future advertising signs is not before us, and we make no decision as to the validity or invalidity of any such ordi-

[1]These matters are left for state court determination.

nance which may or may not be enacted in the future, although we recognize that there is much authority for upholding such prohibitions.

(4) We decide no questions concerning the reasonableness of the regulations as they relate to the type of business involved, the zone in which the sign is located, the comparable heights of signs in various zones, differentiations between free standing and attached signs and various other types of claimed inequality between signs.

(5) We make no decision as to the validity of the sign code under state law.

(6) We make no determination as to whether the code draws arbitrary distinction between various signs.

Moreover, we do not quarrel with nine of the ten "legal principles" argued by the city. We accept as truisms these "legal principles" stressed in the city's brief:—

1. Denver's charter permits the city to enact zoning ordinances.

2. In adopting zoning ordinances, Council may divide the city into districts.

3. Classification within various zone districts is permitted, and outdoor advertising is a type of business subject to separate classification and regulation.

4. Zoning ordinances are to be construed as a whole.

5. Ordinances are presumptively constitutional.

6. If constitutionality is debatable, the ordinance should be upheld.

7. If there is a reasonable factual basis on which the ordinance can be found valid, a court should assume that the legislative body acted on the basis of those facts [unless the record affirmatively shows that another factual basis was relied upon].

8. Many cases hold, and the Colorado Supreme Court has held that under Colorado law non-conforming uses may be terminated if a reasonable amortization period is allowed. [The underlying reasoning of these cases is that constitutionally just compensation may be provided by amortization.]

9. Non-conforming uses should be made conforming as rapidly as is reasonably possible.

We do not agree with the city's tenth "legal principle" that a plan of amortization is the only way in which just compensation can be paid for required termination of non-conforming uses. *Lamm v. Volpe* (1971) 10 Cir. 449 F.2d 1202, infra, 23 U.S.C. §131 and 1963 C.R.S. 120-5-28 (2), all dispose of this "legal principle." The Colorado statute provides:

"The division of highways may remove any non-conforming advertising device and may acquire all real and personal property rights pertaining to the nonconforming advertising device by gift, purchase agreement, exchange, or eminent domain.

> All proceedings in eminent domain shall be conducted as may be provided by law. The division of highways may adopt appraisal concepts and acquisition procedures which are appropriate to the evaluation and removal of nonconforming advertising devices."

If the city wishes to adopt an ordinance similar to the Colorado statute or similar to the federal Highway Beautification Act, no Fifth Amendment question can arise under such an ordinance. The case is before us only because the city wants to force destruction of the signs without cash outlay on its part and because it insists on paying the compensation it admits is due only by way of an amortization scheme instead of paying compensation the way the state and federal governments do. As we shall see before this opinion is concluded, the only real question is, "Who is to pick up the tab for beautification of the city resulting from the tearing down of the advertising signs?" The state and the federal government think that the taxpayers must pay the piper. The city says that the sign companies have to bear the loss.

Before entering upon a discussion of this fundamental question, it is necessary that we dispose of a preliminary argument advanced by the city. The city says that three of the plaintiffs and an intervenor have failed to establish jurisdictional amount. In effect the city argues that proof by these parties at time of trial would not justify an eminent domain award in excess of $10,000.00, but this isn't the test of amount in controversy. *St. Paul Mercury Indemnity Co. v. Red Cab Co.* (1938) 303 U.S. 283. The evidence established that these parties made a good faith claim that they will be damaged by more than $10,000 in a given year as a result of the enforcement of the ordinance, and that is

all that is required. The evidence abundantly meets the test of *Ronzio vy Denver & R.G.W.R. Co.* (1940) 10th Cir. 116 F.2d 604:

> "In determining the matter in controversy, we may look to the object sought to be accomplished by the plaintiffs' complaint; the test for determining the amount in controversy is the pecuniary result to either party which the judgment would directly produce."

In support of its jurisdictional amount argument, the city almost concedes that the evidence at the time of the preliminary injunction hearing was sufficient to establish jurisdictional amount, but then counsel say, "We know of no rule of law whereby the evidence offered by these parties in an application for preliminary injunction carries forward to a hearing on the merits of the case." Rule 65 (a) (2) enunciates such a rule:

> ". . . any evidence received upon an application for a preliminary injunction which would be admissible upon the trial on the merits becomes a part of the record on the trial and need not be repeated upon the trial."

Jurisdictional amount was proven as to all parties, and with the question of jurisdictional amount out of the way, we come to the merits of the case. The important parts of the challenged ordinance are:

> **"Sec. 613-5. Nonconforming Signs.**
>
> ".5-1. Declaration of Public Policy.
> It is reasonable that a time limit be placed upon the continuance of existing nonconforming signs. An amortization program permits the owner to

plan during a period when he is allowed to continue the nonconforming signs while at the same time assuring that the District in which the nonconforming signs exist will eventually benefit from a substantial uniformity of permanent signs.

".5-2. Definition of Nonconforming Signs.
A nonconforming sign shall be any sign which:

".5-2(1). On the effective date of this ordinance was lawfully maintained and had been lawfully erected in accordance with the provisions of any prior zoning ordinance but which sign does not conform to the limitations established by this ordinance in the District in which the sign is located; or

".5-2(2). On or after the effective date of this ordinance was lawfully maintained and erected in accordance with the provisions of this ordinance but which sign, by reason of amendment to this ordinance after the effective date thereof, does not conform to the limitations established by the amendment to this ordinance in the District in which the sign is located.

".5-3. Continuance of Nonconforming Signs.
Subject to the termination hereinafter provided, any nonconforming sign may be continued in operation and maintained after the effective date of this ordinance; provided, however, that no such sign shall be changed in any manner that increases the non-compliance of such sign with the provisions of this ordinance established for signs in the District in which the sign is located; and, provided, further, that the burden of establishing

a sign to be nonconforming under this Section rests entirely upon the person or persons, firm or corporation claiming a nonconforming status for a sign.

".5-4. Termination of Nonconforming Signs.

".5-4(1). By Abandonment. Abandonment of a nonconforming sign shall terminate immediately the right to maintain such sign.

".5-4(2). By Violation of the Ordinance. Any violation of this ordinance shall terminate immediately the right to maintain a nonconforming sign.

".5-4(3). By Destruction, Damage or Obsolescence. The right to maintain any nonconforming sign shall terminate and shall cease to exist whenever the sign is damaged or destroyed, from any cause whatsoever, or becomes obsolete or substandard under any applicable ordinance of the municipality to the extent that the sign becomes a hazard or a danger.

".5-5(4). By Amortization. The right to maintain a nonconforming sign shall terminate in accordance with the following schedule:

"Any sign which on the date the sign became nonconforming would cost the following amount to replace:	Shall be terminated within the following period after the sign became nonconforming:
"$0 to $3,000	2 years
3,001 to 6,000	3 years
6,001 to 15,000	4 years
15,001 or more	5 years

> ".5-5(4)(a). The right to maintain a flashing, blinking, fluctuating, animated or portable sign shall terminate within 30 days after such sign becomes nonconforming."

Whether this ordinance amounts to a permissible use of the police power or amounts to a taking requiring the payment of just compensation under the Fifth Amendment is not a question of easy determination. As was said in *United States v. Central Eureka Mining Co.* (1958) 357 U.S. 155.

> "Traditionally, we have treated the issue as to whether a particular governmental restriction amounted to a constitutional taking as being a question properly turning upon the particular circumstances of each case. See, Pennsylvania Coal Co. v. Mahon, 260 U.S. 393. In doing so, we have recognized that action in the form of regulation can so diminish the value of property as to constitute a taking. E.g., United States v. Kansas City Ins. Co., 339 U.S. 799; United States v. Causby, 328 U.S. 256. However, the mere fact that the regulation deprives the property owner of the most profitable use of his property is not necessarily enough to establish the owner's right to compensation."

The difference between a permissible exercise of the police power and a taking requiring compensation was discussed by Judge Barrett in *Lamm v. Volpe* (1971) 10 Cir. 449 F. 2d 1202. It was there contended that the Tenth Amendment prohibited Congress from enacting the Highway Beautification Act [23 U.S.C. §131]. The Court held that Lamm had no standing and that the question was moot because the State of Colorado had adopted legisla-

tion meeting the requirements of the Highway Beautification Act. However, in the course of the opinion it was said:

> "Lamm has introduced several bills in the Colorado Legislature which he believes would provide effective control of outdoor advertising through exercise of the state police power in lieu of just compensation. Although he does not specifically identify to the police power relied upon, we assume here that his bills declared outdoor advertising adjacent to certain highways a public nuisance, subject to destruction or abatement as injurious to public safety. We recognize that police power is a matter of legislative prerogative. In this field the legislature has wide discretionary powers. It includes everything essential to public safety, health, and morals. Cottrell Clothing Company v. Teets, 139 Colo. 558, 342 P. 2d 1016 (1959). Police power should not be confused with eminent domain, in that the former controls the use of property by the owner for the public good, authorizing its regulation and destruction without compensation, whereas the latter takes property for public use and compensation is given for property taken, damaged or destroyed. Chicago B. & Q. Railway v. State of Illinois ex rel. Drainage Comm'rs., 200 U.S. 561, 26 S. Ct. 341, 50 L. Ed. 596 (1906); Appeal of White, 287 Pa. 259, 134 A. 409 (1926); Annot., 53 A.L.R. 1215 (1928).
>
> "Here the power of regulation has not been preempted by the Congress. But that begs the point. The Congress has clearly determined that the 'taking' of outdoor advertisements adjacent to

> federal-aid highways required 'just compensation.' The Tenth Amendment has been construed 'as not depriving the national government of authority to resort to all means for the exercise of a granted power which are appropriate and plainly adapted to the permitted end.' United States v. Darby, 312 U.S. 100, 124, 61 S. Ct. 451, 462, 85 L. Ed. 609 (1941). . . ."

Lamm v. Volpe does not pass on the question before us — the question of whether advertising signs can be eliminated without payment of compensation except as amortization may represent just compensation. The case simply points up that Lamm wanted to adopt the approach used here by the City rather than the method used by the federal government in the Highway Beautification Act and the method subsequently adopted by the State of Colorado. Although at time of trial the City made a half-hearted attempt to show that the ordinance was passed in the interest of public safety, the unsupported conclusions of its witness were totally destroyed by the testimony of plaintiffs' expert, and there was no believable testimony that the ordinance is in any way related to public safety. In fact, the City fell back on an environmental approach and it relied on its expert, Stuart L. Udall, former Secretary of the Interior, and a lawyer who is "presently involved in environmental planning," Mr. Udall testified:

> ". . . The visual environment obviously is a very important component, and the environment of course as we understand it now is the science of inter-relating all this bundle of things that we used to consider separately, and obviously the visual part of the environment, the appearance of a city, for example, whether we're talking about

> the natural beauty of a city or the inter-relationship between the natural beauty and those activities of man which alter that environment. This is obviously a very important component of the environment. . . .
>
> ". . . The visual aspect of a community of a region is obviously a very important element of the environmental planning that indeed encompasses the total environment. It has to involve itself in policy with regard to signs, with regard to graphics, with regard to the mix between the natural world and the man activities that are involved. So, of course, when you narrow this to the subject of signs as an element of the environment, the question of uses becomes a critical question."

Although Mr. Udall suggested that city beautification is a public concern of quite recent origin, it was recognized by the Supreme Court almost twenty years ago in *Berman v. Parker* (1954) 348 U.S. 26. Justice Douglas there said:

> "If those who govern the District of Columbia decide that the Nation's Capital should be beautiful as well as sanitary, there is nothing in the Fifth Amendment that stands in the way."

But Justice Douglas added:

> *"The rights of these property owners are satisfied when they receive that just compensation which the Fifth Amendment exacts as the price of the taking."*

Justice Douglas and Mr. Udall see eye to eye on the subject, because Mr. Udall's testimony continued:

[He testified that he was familiar with the Highway Beautification Act and that he participated in its formulation.]

"I think in the beginning, within the administration, once it was decided that this should be added as a major amendment to the entire State Highway Act of 1956, the question of how this could be accomplished was widely discussed and there really were two alternatives that you have if a government desires to eliminate undesirable signs, and one is immediate condemnation and payment — full payment for the value of what is taken. The other is some kind of a scheme of amortization, and these two were discussed and considered initially, and the plan that Congress finally adopted was a taking, and outright payment.

"THE COURT: Let me interrupt a minute, Mr. Udall, and see if I follow you. Do you feel as an expert in the field that signs can be taken under either of two alternative methods; first a method of immediate condemnation with the payment of just compensation? Or, in the alternative, a delayed taking which permits an amortization of the investment? [2]

"THE WITNESS: I think these clearly are the two alternatives, yes.

"THE COURT: So, that if a community, if a government elects to follow the second alterna-

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[2]As will be discussed later, the impromptu use of the word "investment" was inartful. The phrase "fair market value" should have been used instead of "investment."

tive, the validity of that election is dependent upon the sufficiency of the amortization provided, isn't that true?

"THE WITNESS: Where [whether] it's reasonable, yes." [3]

In *Rabinoff v. District Court* (1961) 145 Colo. 225, 360 P. 2d 114, Judge Doyle [with Judge McWilliams concurring] quoted with approval some of the same language we have quoted from *Berman v. Parker,* and in *Rabinoff* mention is made of the fact that the Colorado Constitution differs in its language from the Fifth Amendment and this is one of the reasons we did not abstain on the Fifth Amendment claim.

Accordingly, we have no difficulty in concluding that if the citizens of the City and County of Denver wish to eliminate some or all signs, they may do so if they are willing to follow the procedures required of the federal government under the Highway Beautification Act, the procedures adopted by the State of Colorado, and procedures said by their own special counsel-expert witness to be necessary. In other words, a legislative determination that the elimination of signs is in furtherance of an aesthetic public purpose is entirely proper, and the only question which remains is whether the Denver ordinance provides for the payment of whatever just compensation the Fifth Amendment demands. As a corollary to this question is the determination of whether the ordinance is a regulation en-

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[3]Admittedly, Mr. Udall was testifying as an expert on the law at this point, but it came out during his direct examination as an expert for the city, and we regard his statement of position as being in effect a statement of position made by "special counsel"—especially when his contract of employment by the city is studied.

acted under the city's police power, thereby eliminating necessity for the payment of any compensation.

Volumes have been written on the subject, and the courts have been unable to formulate or agree upon any precise rule to distinguish between a permissible regulation and an impermissible taking. We follow the mandate of *United States v. Central Eureka Mining Co., supra,* to ascertain the particular facts of our case.

We reiterate that the Denver ordinance by its terms pretty much contradicts the City's argument that no compensation is required, because the ordinance does not attempt to impose an immediate prohibition on any signs. It sets up an amortization schedule keyed to cost of replacement, and, under the decided cases, this is a recognition that some compensation is owed. Under Denver's ordinance, a sign which would cost $3,000 to replace must be torn down in two years, while a sign which would cost $15,001 to replace can remain standing five years. The ordinance ignores the actual investment of the owner, it ignores the market value of the sign, and it ignores the extent to which a particular owner has recaptured either his investment or the sign's market value, just as it disregards the length of the unexpired leasehold term. It fails in these respects in the face of the following facts which were proven at trial:

1. There is no correlation between signs and public safety or accidents, nor was there any proof that signs cause accidents. The proof was to the contrary.

2. Most signs are leased for five year terms, and approximately three-fourths of the leases are renewed for an additional term or terms. Although the lessor sign companies attempt to make a small profit during the initial leasehold term, the real profit is derived from the renewals, and, addi-

tionally, the lessee gets a better deal during the renewal term. Thus, both parties have a business incentive to renew.

3. There is a market for the sale of sign leases, and sales prices of sign leases include an increment of the probability of renewal of the lease.

4. All signs, over varying periods of time, become obsolete, and when they do, they are removed.

5. Almost without exception, the signs are not adaptable for use elsewhere, and typically, the salvage value of a sign which must be removed does not equal removal cost.

6. Physical depreciation of signs is minimal. This is evidenced by the fact that the Assessor of the City and County of Denver does not permit depreciation of signs for property tax purposes. [The City offered no evidence that the Assessor will change his position even as to signs which must be destroyed under the ordinance.]

7. Every sign in Denver was erected under a permit charged for and issued by the City.

8. In the opinion of most people, many signs and their proliferation are garish eyesores, but due to oddities in the ordinance, some of the most aesthetically offensive signs remain perfectly legal under the ordinance.

9. Flashing, blinking, fluctuating or animated signs are typically the most expensive, but, except for aesthetic considerations, the evidence failed to establish any reason they should be removed sooner than other signs. Additionally, the evidence established the fact that because of the design of such signs, their utility is greatly diminished or destroyed if the movable characteristics of such signs are eliminated. If the blinking, flashing or animation is shut off, the function of the signs would be severely impaired, and the

leases between the parties would be effectively terminated, because the lessee would not be receiving that which he bargained for.

10. Plaintiffs lawfully invested substantial sums of money in the manufacture and erection of signs or in the leasing of signs erected on their premises.

11. In many instances, the market value of the lessees' businesses will be diminished if the signs are removed.

12. As to most of the signs, the ordinance prohibits any use rather than merely restricting the type or extent of use of the signs.

13. Because they are custom made, there is no other location within or without the City and County of Denver at which the signs can be used.

14. There is no relationship between replacement cost and unexpired leasehold term, and there is but limited relationship between replacement cost and either market value or useable life. There is a relationship between investment and replacement cost, but they are a far cry from being identical.

Defendants initially urge that because of the presumptive constitutionality of any legislative act we must search for some rationale which will support constitutionality and they stress that we cannot substitute our judgment for that of City Council. They cite cases such as *Baum v. Denver*, 147 Colo. 104, 363 P. 2d 688, *Bird v. City of Colorado Springs*, ____Colo.____, 489 P. 2d 324, *Standard Oil Company v. City of Marysville*, 279 U.S. 582, and *Goldblatt v. Town of Hempstead*, 369 U.S. 590. These cases support and we agree with these broadly stated legal principles. Here, defendants elected to try to support the constitutionality of the

ordinance on their environmental theory, and their own expert testified that just compensation in one form or another is required. Moreover, we say again that the ordinance itself demonstrates Council's determination that compensation by way of amortization is necessary. As stated in defendants' brief, the case "involves no more and no less than a determination, within the scope of permissible judicial review, of whether the amortization periods provided by the ordinance are reasonable." No presumption of constitutionality and no deference to legislative wisdom will bail out the ordinance if it in fact effects a taking without the payment of just compensation.

Starting from defendants' simplified statement of the case; i.e., the statement that the case involves the single question of whether the amortization periods are reasonable, we refer at once to an annotation in 22 *A.L.R. 3rd* 1134, entitled *"Validity of Provisions for Amortization of Nonconforming Uses."* A review of the cases there discussed demonstrates that with only a few exceptions, reasonable amortization periods have been held to eliminate need for the payment of just compensation. This seems to be the rule in Colorado. *Service Oil Co. v. Rhodus* (1972) ____Colo.____, 500 P. 2d 807. Probably no case has been more frequently cited in support of the constitutionality of required amortization of non-conforming uses than *Naegele Outdoor Advertising Co. v. Village of Minnetonka* (1968) (Minn.) 162 N. W. 2d 206. There, the village required the removal of all non-conforming billboards within three years. *Naegele* limited its attack to a contention that the ordinance was unconstitutional on its face, and the question of whether it was unconstitutional in its application, which is included in our case, was not there presented. The ordinance was upheld, and the Minnesota Court said:

"Plaintiff cannot successfully challenge this ordinance as unconstitutional on its face unless it would be unconstitutional as applied to the property interests of every billboard owner. The underlying issue in making this determination must therefore be whether the amortization period provided by the statute is reasonable. If the value of plaintiff's property interest was extinguished before the running of the 3-year period, there would be no taking, or if the value of freedom from new competition for the statutory period equalled the value of the property interest remaining at the end of the period, there would be just compensation for the taking. In either case, the length of the amortization period is reasonable and the ordinance therefore is constitutional. Moreover, since several conceivable applications of the ordinance are reasonable, it is not unconstitutional by its terms. The question then becomes one of the unconstitutional application of the ordinance in a given case, and the burden is on plaintiff to establish that the ordinance, as applied, is unconstitutional. Plaintiff, however, has based its challenge on the argument that the ordinance is unconstitutional on its face and has introduced little or no evidence that the 3-year amortization period is unreasonable as applied.

. . . . . .

"Finally, plaintiff claims that it was deprived of its property interest in the leases themselves. If a property right is taken for a public use, compensation by payment of its fair market value is required. In the case of a taking of a lease-

hold interest, this amount 'is the fair rental value of the premises less the amount of the rent for the remainder of the term.' In re Assessment for Widening Third Street in St. Paul, 176 Minn. 389, 390, 223 N.W. 458.

"Ten of the leases in question are oral and amount to no more than month-to-month tenancies. The value of such a leasehold is limited to the rental value of the premises for 30 days less the rent payment for that period. Riebs v. Milwaukee County Park Comm., 252 Wis. 144, 31 N.W. 2d 190. The other 8 leases are written and vary in length from 1 to 10 years. However, plaintiff has offered no evidence on the fair market value of any of these leases at the end of the statutory amortization period. Thus, it is impossible for us to say that there has been such a taking of a valuable property interest from plaintiff as to render this application of the ordinance unconstitutional."

Here, of course, plaintiffs have presented evidence on the subjects not decided by *Naegele*, and, as we shall discuss later, the Minnesota Court's definition of market value of a leasehold does not square with present Fifth Amendment law. Moreover, in *Naegele*, all billboards were treated alike, while here amortization periods vary with cost of replacement. The uncontradicted expert testimony in this case was to the effect, and we find, that there is no conceivable economic or accounting theory which lengthens or shortens the amortization period on the basis of replacement cost of a sign. The Internal Revenue Service would give short shrift to any such contention, and so do we. Carried to its inevitable illogical conclusion, owners of small homes would

have to get out without payment for their houses at the end of two years, but owners of more expensive homes couldn't be thrown out for five years. Highways could be built through residential areas, and the smaller homeowners could be thrown out in two years, but owners of luxury homes could stay put for five years, albeit none of the owners would ever be paid a dime for their homes.

Amortization is but a function of depreciation, and a smaller house of equivalent construction doesn't depreciate more rapidly than does a larger one, and neither does a smaller sign built from the same materials as a larger one depreciate in 2/5ths of the time it takes a more expensive one to wear out. These comments we make not in support of any equal protection determination, but, rather we make them as illustrative of the manifest unreasonableness of the amortization schedules in the Denver ordinance, even if amortization be held to be a type of payment of just compensation.

With this caveat to the ordinance's varying allowable amortization periods tied to replacement costs, we mention that without extended discussion by the Court, a five year amortization period for all nonconforming signs was upheld in *E. B. Elliott Advertising Co. v. Metropolitan Dade County* (1970) 5 Cir. 425 F. 2d 1141. The Court held that elimination of signs was in furtherance of a permissible legislative determination of public purpose [a determination we have already made in this case], and in addressing itself to the Fifth Amendment question, the court said:

> "The final issue presented by this appeal is whether Ordinance No. 63-26 deprives the appellants and others of their class of their property without just compensation contrary to the due

process requirements of the Fourteenth Amendment. See Panhandle E. Pipe Line Co. v. State Highway Comm., 294 U.S. 613, 55 S. Ct. 563, 79 L. Ed. 1090 (1935).

"Ordinance No. 63-26 was enacted on July 2, 1963, and provides that nonconforming signs may continue to be maintained until March 1, 1968, thus providing an amortization period of five years. In Standard Oil Co. v. City of Tallahassee, N.D. Fla. 1949, 87 F. Supp. 145, aff'd. 5 Cir. 1950, 183 F. 2d 410, cert. den. 340 U.S. 892, 71 S. Ct. 208, 95 L. Ed. 647, it was held a zoning ordinance requiring the discontinuance of a nonconforming use after the expiration of a five-year amortization period did not constitute a deprivation of property without due process of law. Accord, Naegele Outdoor Adv. Co. v. Village of Minnetonka, Minn. 1968, 162 N.W. 2d 206; City of Seattle v. Martin, 1959, 65 Wash. 2d. 541, 342 P. 2d 602; Grant v. Mayor and City Council of Baltimore, 212 Md. 301, 129 A. 2d 363 (1957); City of Los Angeles v. Gage, 1954, 127 Cal. App. 2d 442, 274 P. 2d 34. Therefore, the requirement contained in the ordinance that all nonconforming signs be removed by March 1, 1968, does not constitute a taking of property for which compensation must be given under the Fourteenth Amendment."

At time of trial, we thought that *E. B. Elliott Advertising Co., supra,* was persuasive authority for upholding an ordinance which would require removal of all non-conforming signs at the end of a five year period, but *E. B. Elliott Advertising Co., supra,* was decided and our trial was held

before January 16, 1973, the date on which *Almota Farmers Elevator & Warehouse Co. v. United States*,____U.S.____ was decided.[4] Our trial date thinking stemmed from the evidence that almost all sign leases were for a five year period and from a belief that the leasehold term fixed the measure of compensation. Colloquy in the record shows that we so understood *United States v. Petty Motor Co.* (1945) 327 U.S. 372. We understood *Petty Motor Co.* as did the four dissenting Justices in *Almota Farmers Elevator and Warehouse Company*, where, speaking for the dissent, Justice Rehnquist said:

> "In United States v. Petty Motor Co., supra, the Government acquired by condemnation the use of a structure occupied by tenants in possession under leases for various unexpired terms. The Court held that the measure of damages for condemnation of a leasehold is the value of the tenant's use of the leasehold for the remainder of the agreed term, less the agreed rent. The Court considered the argument, essentially the same raised by petitioner here, that a history of past renewal of the leases to existing tenants creates a compensable expectancy, but held that the right to compensation should be measured solely on the basis of the remainder of the tenant's term under the lease itself. 327 U.S., at
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> . . . . . .
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> 380. In so deciding, the Court stated:
>
> > 'The fact that some tenants had occupied their leaseholds by mutual con-

[4]Both also antedated *Shulter v. United States* (1973) 10 Cir. 470 F. 2d 1143.

sent for long periods of years does not add to their rights. Emery v. Boston Terminal Co., 178 Mass. 172, 185, 59 N.E. 763 [per Holmes, C. J.]:

> ' "It appeared that the owners had been in the habit of renewing the petitioners' lease from time to time. . . . Changeable intentions are not an interest in land, and although no doubt such intentions may have added practically to the value of the petitioners' holding, they could not be taken into account in determining what the respondent should pay. They added nothing to the tenants' legal rights, and legal rights are all that must be paid for. Even if such intentions added to the saleable value of the lease, the addition would represent a speculation on a chance, not a legal right." ' 327 U.S., at 390 n. 9.

"The holding in Petty was consistent with a long line of cases to the effect that the Fifth Amendment does not require, in a taking of a property interest, compensation for mere expectancies of profit, or for the frustration of licenses or contractual rights which pertain to the land, but which are not specifically taken and which are not vested property interests. Omnia Commercial Co. v. United States, 261 U.S. 502, 510 (1923); Sinclair Pipe Line Co. v. United States, 287 F. 2d 175, 178 (Ct. Cl. 1961); Chicago, M., St. P. & P. R. Co. v. Chicago, R. I. & P. R. Co.,

138 F. 2d 268, 270-271 (CA8 1943), cert. denied, 320 U.S. 804 (1944)."

Because of our misunderstanding of *Petty Motor Co.*, it was with reluctance that we permitted testimony concerning the probability of renewal; that such probability is traded in the marketplace and is subject to market value determination. It is fortunate that we did permit the testimony, because the majority in *Almota Farmers Elevator and Warehouse Company* held:

> "In view of this conflict in the circuits, we granted certiorari, 405 U.S. 1039, to decide an important question of eminent domain law: 'Whether, upon condemnation of a leasehold, a lessee with no right of renewal is entitled to receive as compensation the market value of its improvements without regard to the remaining term of its lease because of the expectancy that the lease would have been renewed.
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> . . . . . .
>
> "The Fifth Amendment provides that private property shall not be taken for public use without 'just compensation.' 'And "just compensation" means the full monetary equivalent of the property taken. The owner is to be put in the same position monetarily as he would have occupied if his property had not been taken.' United States v. Reynolds, 397 U.S. 14, 16 (footnotes omitted). See also United States v. Miller, 317 U.S. 369, 373. To determine such monetary equivalence, the Court early established the concept of 'market value': the owner is entitled to the fair market value of his property at the time of

the taking. New York v. Sage, 239 U.S. 57, 61. See also United States v. Reynolds, supra, at 16; United States v. Miller, supra, at 374. And this value is normally to be ascertained from 'what a willing buyer would pay in cash to a willing seller.' United States v. Miller, supra, at 374. See United States v. Virginia Electric and Power Co., 365 U.S. 624, 633.

"By failing to value the improvements in place over their useful life — *taking into account the possibility that the lease would be renewed* as well as the possibility that it might not — the Court of Appeals in this case failed to recognize what a willing buyer would have paid for the improvements. If there had been no condemnation, Almota would have continued to use the improvements during the renewed lease term, or if it sold the improvements to the fee owner or to a new lessee at the end of the lease term, it would have been compensated for the buyer's ability to use the improvements in place over their useful life.

. . . . . .

"United States v. Petty Motor Co., 327 U.S. 372, upon which the Government primarily relies, does not lead to a contrary result. The Court did indicate that the measure of damages for the condemnation of a leasehold is to be measured in terms of the value of its use and occupancy for the remainder of the lease term, and the Court refused to elevate an expectation of renewal into a compensable legal interest. But the Court was not dealing there with the fair market value of improvements. Unlike Petty Motor, there is no ques-

> tion here of creating a legally cognizable value where none existed, or of compensating a mere incorporeal expectation. The petitioner here has constructed the improvements and seeks only their fair market value. Petty Motor should not be read to allow the Government to escape paying what a willing buyer would pay for the same property.
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> . . . . . .
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> "At the time of the taking in this case, there was an expectancy that the improvements would be used beyond the lease term. But the Government has sought to pay compensation on the theory that at that time there was no possibility that the lease would be renewed and the improvements used beyond the lease term. It has asked that the improvements be valued as though there were no possibility of continued use. That is not how the market would have valued such improvements; it is not what a private buyer would have paid Almota.
>
> " 'The constitutional requirement of just compensation derives as much content from the basic equitable principles of fairness, United States v. Commodities Trading Corp., 339 U.S. 121, 124 (1950), as it does from technical concepts of property law.' "

Almota emphatically holds that market value[5] over the useful life of the improvements is the test. *Almota* rejects the unexpired leasehold term as the measure of value, and

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[5]"Market value" is the established test in the law, and the court's reference at time of trial to an owner's "investment" was inadvertent.

it demands that the provable value of a probability of renewal must be paid for. Read in the way most favorable to upholding its constitutionality, the Denver ordinance by its terms uses "replacement cost" as the measure of value, and, based on the record made, it may vaguely relate the amortization period to unexpired leasehold term, but it certainly does not permit amortization over useful life. If *Almota* means what we think it says, even the longest amortization permitted under the Denver ordinance does not approach compensating the owners for the value of the signs over their useful life, even if amortization is said to be permissible compensation. Therefore, whatever may have been the law before 1973, after *Almota*, it must be held that the amortization provided by the Denver ordinance does not meet the Fifth Amendment's requirement for the payment of just compensation.[6] Legislative rough approximations of just compensation won't do.

Almota effectively disposes of this case,[7] but additional comments are in order. The hairline distinction between permissible regulation and compensable taking is fully discussed in the majority and dissenting opinions in *City of St. Paul v. Chicago, St. Paul, Minneapolis and Omaha Railway Company* (1969 8 Cir.) 413 F. 2d 762. The majority held that a height restriction on future buildings which could be erected on the railroad's lands was permissible. The majority said, inter alia:

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[6]Just what overall effect *Almota* has on the constitutionality of amortization of non-conforming uses we leave for another day and, we hope, another court.

[7]Amicus Consumers for Better Signs and Plan Metro Denver distinguishes *Almota* on the ground that it was an eminent domain case, and, says Amicus, *Almota* is therefore inapplicable. We do not subscribe to the theory that the applicability of the Fifth Amendment is governed by the nomenclature or form of the action.

"Neither constitutional provision interposes a barrier to the imposition of restrictions on the use of private property if a zoning ordinance is enacted pursuant to a valid exercise of the police power. Goldblatt v. Town of Hempstead, 369 U.S. 590, ...

"The test is whether the enactment falls within that power is one of reasonableness.

"The zoning ordinance will be sustained unless its '* * * provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare.

. . . . . .

"The mere fact that the ordinance seriously *depreciates* the value of the complainants' property is not enough to establish its invalidity. Goldblatt v. Town of Hempstead, supra at 594, 82 S. Ct. at 990, American Wood Products Co. v. City of Minneapolis, 21 F. 2d 440, 444 (D. Minn. 1927) (J. Sanborn), aff'd, 35 F. 2d 657 (8th Cir. 1929); Kiges v. City of St. Paul, 62 N.W. 2d at 369. Nor can it be invalidated on the grounds that aesthetic considerations will be furthered if it is permitted to stand. Berman v. Parker, 348 U.S. 6, ...

"No evidence was offered at trial to show: that the ordinance was designed to restrict competition, compare, Pearce v. Village of Edina, 263 Minn. 553, 118 N.W. 2d 659, 671, n. 1 (1962); or that the railroads acquired the property with the expectation that it would be used in the man-

ner they now seek, compare, Alexander v. City of Minneapolis, 267 Minn. 155, 125 N.W. 2d 583, 585 (1963); or that the railroads cannot continue to use their property as they have in the past."

Judge Mehaffey filed a vigorous dissent. He said: "'The majority opinion is erroneously based first on the mistaken assumption that there is no 'taking' of appellees' property, and hence no violation of the mandate of the Fifth Amendment that '* * * nor shall private property be taken for public use, without just compensation,' and Artical 1, § 13 of the Minnesota Constitution which provides that 'private property shall not be taken, destroyed or damaged for public use without just compensation therefor, first paid or secured.' The Supreme Court has long and consistently held that governmental restrictions can so diminish the value of property as to constitute a taking. In United States v. Central Eureka Mining Co., 357 U.S. 155, 168, 78 S. Ct. 1097, 1104, 2 L. Ed. 2d 1228 (1958), the Court said:

> 'Traditionally, we have treated the issue as to whether a particular governmental restriction amounted to a constitutional taking as being a question properly turning upon the particular circumstances of each case. * * * *In doing so, we have recognized that action in the form of regulation can so diminish the value of property as to constitute a taking.*' " [Emphasis by the Court]

The dissenting opinion then distinguishes the cases on which the majority relied [and in large part they are the cases urged by the City here] and Judge Mehaffey expressed the strong view that the St. Paul ordinance effected a taking. On rehearing, to consider the effect, if any, of *Indiana Toll Road Commission v. Jankovich*, 379 U.S. 487, the judges adhered to their earlier views. We do not think that even the views of the majority in *City of St. Paul* are particularly supportive of the City's contentions here. A reading of the opinions in that case convinces that the ordinance was upheld because reasonable uses of the property by the railroad company remained, and the St. Paul ordinance restricted only the *type of use* instead of prohibiting *all use* as does the Denver sign ordinance. In *Jankovich*, the Supreme Court held that the writ of certiorari had been improvidently granted for the reason that the decision of the Indiana Supreme Court was based upon state rather than federal constitutional grounds. The Indiana Court held that an ordinance of the City of Gary limiting the height of improvements in airway approach lanes to 18 feet was a taking which required the payment of compensation, and in dismissing the writ of certiorari, Justice White said:

> "The Indiana Supreme Court had before it a case in which the effect of the ordinance was to establish a maximum height of 18 feet for structures on respondent's land. Although it recognized that zoning regulations may be upheld as a reasonable exercise of the police power *'where the owner of property is merely restricted in the use and enjoyment of his property'* 244 Ind. at 581, 193 N.E. 2d at 240-241, the court held that a taking requiring compensation — rather than

> mere regulation — was effected here because 'the City of Gary has attempted, by the passage of the ordinance under consideration, to take and appropriate to its own use the ordinary usable air space of property adjacent to the Gary Airport.' "

Justice White said that no opinion was expressed as to the constitutionality of the ordinance under the Fifth Amendment, and we do not quote the case as an expression of any such view. However, his opinion does make the distinction we deem applicable — the distinction between a restriction on type of use and a prohibition against any reasonable use [and in our case a prohibition against any use at all.] Where the ordinance does no more than to reasonably restrict uses, leaving available other uses, it properly can be said to be within the police power and payment of compensation is not required. Where the ordinance prohibits any use or where it prohibits all reasonable uses, there is a taking, and the Fifth Amendment comes into play and demands the payment of just compensation. The Denver ordinance is in the second category, and, unless payment of just compensation is provided for, the ordinance must fall.

An illustration of the distinction between restrictions on the use of property and orders for the destruction of property can be drawn from the current public debate over the environmental problem of air pollution caused by automobiles. There is much grumbling over threatened gasoline rationing which would curtail the use of automobiles, but, assuming, arguendo, that such a regulation would be a valid exercise of the police power permitting reasonable restrictions on the use of automobiles, the same cleanliness of the air could be more expeditiously obtained by ordering

the destruction of fifty percent of the automobiles in the country.[8] The general public would immediately cry out that such a command was unconstitutional under the Fifth Amendment as an uncompensated taking. The Denver ordinance is no less unconstitutional just because it is aimed at sign companies instead of drawing bead on the public at large.

The headon collision between claims of police power and constitutional protections is as old as is our country. Just so long as their own property is not the object of attack, zealots are eager to bring about their ends through police power claims, but the limitations on the accomplishment of such righteous desires has never been better expressed than in the words of Justice Holmes in *Pennsylvania Coal Co. v. Mahon* (1922) 260 U.S. 393:

> ". . . The protection of private property in the Fifth Amendment . . . provides that it shall not be taken for [public] use without compensation. . . . When this seemingly absolute protection is found to be qualified by the police power, the natural tendency of nature is to extend the qualification more and more until at last private property disappears. But that cannot be accomplished in this way under the Constitution of the United States. . . .
>
> *"We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."* [emphasis supplied.]

[8]Under the theory of Denver's ordinance, Vegas would have to be destroyed in two years, Impalas in three years, Oldsmobiles in four years and Cadillacs in five years.

Perhaps [and we do not pass on the question] if City Council wishes, or if a majority of the people of the City wish, all or any part of the signs in Denver can be eliminated. But, if so, they can be eliminated only in accordance with the requirements of the Fifth Amendment, and the prohibitions against shortcuts mentioned by Justice Holmes are still enjoined by the Constitution. At best, if City Council wishes, or if a majority of the people of the City wish, all or any part of the signs in Denver can be eliminated by an ordinance which provides for the payment of "the full monetary equivalent of the property taken (which includes) what a willing buyer would have paid . . . for the buyer's ability to use the improvements over their useful life." *Almota Farmers Elevator & Warehouse Co. v. United States* (1973) ____ U.S. ____. Denver's signs can be eliminated if Denver is willing to provide for such elimination in the way the federal government and the state has so provided. Whether Denver wants to incur this expense is a decision City Council and the taxpayers must make.

We do not hold that immediate full payment in cash is necessarily the only possible solution. We hold only that the present Denver ordinance does not provide for the payment of just compensation. Whether a constitutional ordinance which does not require a cash payment of just compensation can be devised, we leave to the ingenuity of the City. Our decision today is limited to the existing ordinance which is all that is before us. Sec. 613.5-5(4) and Sec. 613-5-5(4)(a) are violative of the protections of the Fifth Amendment of the Constitution of the United States, and they are unconstitutional.

With this determination, we do not reach the other constitutional questions presented, because we should not resolve "constitutional questions unless their answers are in-

dispensable to the disposition of the cause before us." *Stefanelli v. Minard*, 342 U.S. 117. See, also, *Peters v. Hobby*, 349 U.S. 331, *United States v. Spector*, 343 U.S. 169, and *Toomer v. Witsell*, 334 U.S. 385.

Plaintiffs seek injunctive relief against the enforcement of Sec. 613.5-5(4)(a) of Denver's Revised Municipal Code. A preliminary injunction against the enforcement of that section was granted on December 9, 1971, and that preliminary injunction is made permanent. As to the remaining portions of Sec. 613.5-5(4), of the Revised Municipal Code of the City and County of Denver, plaintiffs ask only declaratory relief, and this memorandum opinion sets forth the findings and conclusions supportive of the declaratory judgment requested. Plaintiffs are directed to submit an appropriate form of declaratory judgment within 10 days of the date of this opinion, which judgment shall include a declaration that Denver's Revised Municipal Code, Sec. 613.5-5(4) and Sec. 613.5-5(4)(a) are violative of the Fifth Amendment of the Constitution of the United States because they attempt to accomplish a taking of property without the payment of just compensation. Plaintiffs and Intervenor shall be awarded their costs. Amicus shall bear their own costs.

Dated at Denver, Colorado, this 4th day of April, 1973.

FRED M. WINNER,
United States District Judge

IN THE

Supreme Court of the United States

October Term, 1973

No. 73-1539

ART NEON CO., et al.,
Petitioners,

vs.

THE CITY AND COUNTY OF DENVER, et al.

BRIEF IN OPPOSITION TO APPLICATION FOR WRIT OF CERTIORARI

Appellee-Respondents, for the reasons hereinafter set forth, oppose and object to the issuance of a Writ of Certiorari herein.

REASONS FOR DENYING THE WRIT

As is to be expected, the evidentiary background is presented in a manner most favorable to Petitioner. At the present state of proceedings, we are not disposed to burden the Court with a

lengthy demonstration of the actual evidentiary background. For the present, suffice it to say that evidence produced by Respondent municipality established that the challenged ordinance provisions bore a most reasonable relationship to the public health, safety, and welfare, and represented a wholly valid exercise by the municipality of the police power vested in it.

But even assuming the propriety of the evidence as allegedly produced, the considerations governing review on Certiorari indicate that the Writ should not issue. Rule 19.

There is no conflict between Courts of Appeal. Both the Fifth Circuit and the Tenth Circuit are in complete agreement as to the proper disposition of a matter of the type here involved. *E. B. Elliott Adv. Co. vs. Metropolitan Dade County,* 425 F. 2d 1141 (5th Circ.), 1970.

As a matter of fact, in a case involving an identical factual situation as here involved, application for Certiorari was denied. *Markham Advertising Co., et al. vs. The State of Washington, et al.,* (Washington 1968), 439 P. 2d 248; appeal dismissed 89 S. Ct. 553, 393 U.S. 316, 21 L. Ed. 2d 512; rehearing denied 89 S. Ct. 854; 393 U. S. 1112, 21 L. Ed. 2d 813. It is of some considerable interest that the appeal was dismissed for want of a substantial federal question.

THE CONCLUSION

WHEREFORE, for the reasons aforesaid, Appellee-Respondents respectfully submit that the application for Certiorari should be denied.

Respectfully submitted,

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INDEX

Page

Interest of Amicus Curiae 1
Statement of the Case 2
Questions Presented 2
Reasons for Granting the Writ 3
Conclusion 10

CITATIONS

CASES:

Appeal of Girsch, 437 Pa. 237, 263 A.2d 395 (1970) 8

Art Neon Co. v. City and County of Denver, 357 F. Supp. 466 (D. Colo. 1973) 7

Beaver Gasoline Co. v. Zoning Hearing Bd., 1 Pa. Cmwlth. 458, 275 A. 2d 702 (1971), *vacated* 285 A. 2d 501 (1972) 8

Bell v. Burson, 402 U.S. 535 (1949) 4

Berman v. Parker, 348 U.S. 26 (1954) 5

Buchanan v. Warley, 245 U.S. 60 (1917) 3

Bzovi v. City of Livonia, 350 Mich. 489, 87 N.W. 2d 110 (1957) 8

City of La Mesa v. Tweed & Gambrell Planing Mill, 146 Cal. App. 2d 762, 304 P. 2d 803 (1957) 8, 9

City of Los Angeles v. Gage, 127 Cal. App. 2d 442, 274 P. 2d 34 (1954) 6, 7, 8, 9

City of Santa Barbara v. Modern Neon Sign Co. 189 Cal. App. 2d 188, 11 Cal Rptr. 57 (1961) 9

Eutaw Enterprises, Inc. v. City of Baltimore, 241 Md. 686, 217 A. 2d 248 (1966) 6, 7

Fuentes v. Shevin, 407 U.S. 67 (1972) 4

Grant v. Mayor and City Council of Baltimore, 212 Md. 301, 129 A. 2d 363 (1957) 8

Index Continued

Page

Harbison v. City of Buffalo, 4 N.Y. 2d 553, 176 N.Y.S. 2d 598, 152 N.E. 2d 42 (1958) 8

Hoffman v. Kinealy, 389 S.W. 2d 745 (Mo. 1965) 4

Jones v. City of Los Angeles, 211 Cal. 304, 295 P. 14 (1930) 6

Livingston Rock & Gravel Co. v. County of Los Angeles, 43 Cal. 2d 121, 272 P. 2d 4 (1954) 8

Lynch v. Household Finance Corp., 405 U.S. 538 (1972) 3-4

Missouri Pacific Ry. v. Nebraska, 164 U.S. 403 (1896) 2

National Advertising Co. v. County of Monterey, 1 Cal. 3d 875, 83 Cal. Rptr. 577, 464 P. 2d 33 (1970) 8

National Bd. of YMCA v. United States, 395 U.S. 85 (1969) 3

Nectow v. Cambridge, 277 U.S. 183 (1928) 4

Norate Corp. v. Zoning Hearing Bd. of Adjustment, 417 Pa. 397, 207 A. 2d 890 (1965) 8

Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922) 6, 7

People ex rel. Trust Co. of Chicago v. Village of Skokie, 408 Ill. 397, 97 N.E. 2d 310 (1951) 8

Snidach v. Family Finance Corp., 395 U.S. 337 (1969) 4

State ex rel. Dema Realty v. Jacoby, 168 La. 752, 123 So. 314 (1929) 6

State ex rel. Dema Realty Co. v. McDonald, 168 La. 172, 121 So. 613 (1929), *cert. denied* 280 U.S. 556 (1929) 6

Swain v. Bd. of Adjustment of University Park, 433 S.W. 2d 727 (Texas Ct. of Civ. App. 1968) 8-9

Index Continued

Page

Town of Hempstead v. Romano, 33 Misc. 2d 315, 226 N.Y.S. 2d 291 (1962) 7, 8

Varney & Green v. Williams, 155 Cal. 318, 100 P. 867 (1909) 8

Village of Oak Park v. Gordon, 32 Ill. 2d 295, 205 N.E. 2d 464 (1965) 6

Village of Belle Terre v. Boraas, 42 U.S.L.W. 4475 (April 1, 1974) (Marshall, J., dissenting) 5

Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) 4, 5

STATUTES AND ORDINANCES:

DENVER, COLO., REV. MUN. CODE §§ 613.5-5(4), 613.5-5(4) (a) (1971) 2

MISCELLANEOUS:

Z. CHAFEE, JR., HOW HUMAN RIGHTS GOT INTO THE CONSTITUTION 45 (1952) 3

W. MCKECHNIE, MAGNA CHARTA: A COMMENTARY ON THE GREAT CHARTER OF KING JOHN 1-112 (1905) .. 3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1539

ART NEON CO., et al.,
Petitioners,

v.

THE CITY AND COUNTY OF DENVER, et al.

BRIEF ON BEHALF OF THE NATIONAL ELECTRIC SIGN ASSOCIATION, AS AMICUS CURIAE.

Counsel for all parties have consented in writing to the participation of the National Electric Sign Association as *amicus curiae* in support of the petition in the above-entitled case and to the filing of this brief.

INTEREST OF AMICUS CURIAE

The National Electric Sign Association is a non-profit trade association, composed of approximately eight hundred electric sign companies, who together comprise seventy-five percent of the electric on-premise sign industry in the United States.

Accordingly, the Association has a vital interest in the development of the law of land use.

The imposition of the Denver amortization ordinance, which was sustained by the court below, has resulted in a loss to the petitioners of approximately one million five hundred thousand dollars ($1,500,000). If this precedent remains undisturbed, every member of the Association operating in a political subdivision which has adopted or will adopt the amortization technique may incur losses of similar magnitude. Our concern is only partly economic. The Association's interest stems as well from a basic concern that the decision below reflects a fundamentally erroneous perception of the constitutional limits on land use regulation, with implications that reach far beyond the commercial sector.

Amicus urges that the issues presented in this case raise important questions of Federal constitutional law which have not been, but should be, decided by this Court.

STATEMENT OF THE CASE

Amicus adopts the "Statement of the Case" set forth in the Petition for Writ of Certiorari.

QUESTIONS PRESENTED

1. Is the amortization technique adopted by the Denver ordinance a constitutionally permissible device for land use regulation?[1]

2. If such an amortization technique is constitutionally permissible, what limits are imposed upon its use by the Fifth Amendment to the United States Constitution?[2]

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[1] DENVER, COLO., REV. MUN. CODE §§613.5-5(4), 613.5-5(4)(a) (1971).

[2] The protection against governmental confiscation of private property, applicable only to the Federal Government by the terms of the Fifth Amendment, has been applied to state and municipal governmental bodies via the "due process" clause of the Fourteenth Amendment. Missouri Pacific Ry. v. Nebraska, 164 U.S. 403 (1896).

REASONS FOR GRANTING THE WRIT

I. The amortization technique upsets the required constitutional balance between permissible land use regulation and individual property rights.

The petition before the Court presents a striking manifestation of the conflict between two competing societal interests—that of the individual in the free and unfettered use of private property, and that of the community in reconciling the common weal with the inevitable divergence of individual choices.

The protection of the individual's right to acquire and retain property free from governmental incursion is a principle that antedates our own Constitution.[3] Moreover, the protections accorded by the Fifth Amendment apply to the use as well as to the ownership of property:

> "Property is more than the mere thing which a person owns. It is essential that it include the right to acquire, *use* and dispose of it. The Constitution protects *these essential attributes of property.*" *Buchanan v. Warley,* 245 U.S. 60, 74 (1917) (Emphasis added).

This Court has consistently rejected any invitation to dilute the protection provided property and its uses by the Fifth Amendment:

> "Ordinarily, of course, governmental occupation of private property deprives the private owner of his *use* of the property, and it is *this deprivation* for which the Constitution of the United States *requires compensation.* See, e.g., U.S. v. General Motors, 233 U.S. 373, 378, 89 L.Ed. 311, 318, 65 S.Ct. 357, 156 A.L.R. 390." *National Bd. of YMCA v. United States,* 395 U.S. 85, 92 (1969) (Emphasis added).

Indeed, the rights of "acquisition, enjoyment and alienation of property" have been termed "basic civil rights". *Lynch v. House-*

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[3] The prohibition against governmental confiscation of private property constituted one of the Articles of the Magna Charta. See the discussion in Z. CHAFEE, JR., HOW HUMAN RIGHTS GOT INTO THE CONSTITUTION 45 (1952); W. MCKECHNIE, MAGNA CHARTA: A COMMENTARY ON THE GREAT CHARTER OF KING JOHN 1-112 (1905).

hold Finance Corp., 405 U.S. 538, 544 (1972); *cf. Fuentes v. Shevin*, 407 U.S. 67 (1972); *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969); *Bell v. Burson*, 402 U.S. 535 (1949).

In contradistinction to the breadth of individual property rights is this Court's recognition that liberty can become license and that some room must be left for governmental attempts to reconcile the exercise of property rights with the community's interest in public health, safety and welfare. In *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), this Court held that general or comprehensive zoning ordinances were appropriate mechanisms for effecting this reconciliation. Nonetheless, as this Court has recognized in subsequent decisions, an overly broad exercise of general zoning powers impinges upon the protection afforded by the Fifth Amendment. *See, e.g., Nectow v. Cambridge*, 277 U.S. 183 (1928). The question posed for resolution before this Court is where the amortization technique, sustained below, should be placed when the line is drawn between regulation and confiscation.

In deciding this question, this Court should realize that, stripped to its essentials, the amortization device employed by the Denver ordinance requires the termination of a use of property which was, prior to the ordinance's enactment, perfectly permissible and which retains demonstrable economic value, without tendering any compensation for the resultant loss. Viewed in the light of its operative effect, the techniques represents an attempt to accomplish tomorrow what could not constitutionally be done today:

> ". . . To our knowledge, no one has, as yet, been so brash as to contend that such a pre-existing lawful nonconforming use properly might be terminated *immediately*. In fact, the contrary is implicit in the amortization technique itself which would validate a taking *presently* unconstitutional by the simple expedient of *postponing* such taking for a 'reasonable' time." *Hoffman v. Kinealy*, 389 S.W. 2d 745, 753 (Mo. 1965).

The Court of Appeals for the Tenth Circuit failed to confront this consequence of the amortization technique in misplaced deference to the broad zoning powers of municipalities.

While this Court has indicated that deference should be accorded governmental judgments concerning proper land use allocation, *see Village of Euclid v. Ambler Realty Co., supra,* such deference neither implies nor includes abdication. "This Court has an obligation to insure that zoning ordinances, even when adopted in furtherance of such legitimate aims, do not infringe fundamental constitutional rights." *Village of Belle Terre v. Boraas,* 42 U.S.L.W. 4475, 4479 (April 1, 1974) (Marshall, J., dissenting).

The constitutional inquiry does not terminate, as did that of the Court below, with a determination that a particular zoning ordinance serves a permissible "public purpose". While it is well established that the range of "public purposes" properly pursued by municipal authorities is not to be narrowly confined, the existence of an appropriate public purpose by no means confers upon a municipality immunity from the prohibition against confiscation contained in the Fifth Amendment.

In this Court's landmark decision in *Berman v. Parker,* 348 U.S. 26 (1954), regarding the permissible scope of the "public purpose" doctrine, the following limitation was emphasized:

> "Once the object is within the authority of Congress, the right to realize it through the exercise of eminent domain is clear. For the power of eminent domain is merely the means to the end (Citations omitted).
>
> * * * *
>
> The rights of these property owners are satisfied when they receive that just compensation which the Fifth Amendment exacts as the price of the taking." *Id.* at 33, 36.

The legal and practical implications of the Tenth Circuit's decision are clear. The principle enunciated is that a municipality may determine that a use of property, formerly deemed acceptable,

must cease, without compensation, once it is perceived to be inconsistent with some "public purpose" and that the Fifth Amendment will not stand in the way. The practical implications are equally disturbing. Should the Denver City Council determine that the goals of reducing population density, transportation difficulties and pollution problems in downtown Denver would be furthered by limiting buildings to a height of five stories, and should it also require that all existing taller buildings either conform to the new requirement or be removed, at the owner's expense, by a date certain, such an ordinance would fall clearly within the bounds of the Tenth Circuit's decision. This example is not altogether fanciful. The amortization technique is enjoying increasing popularity, and has been applied to many property uses not traditionally viewed as nuisances.[4]

In sum, the principles embodied in the decision of the Court below represent an invitation to municipalities to circumvent Fifth Amendment protections, and constitute an unwarranted erosion of the principles which Mr. Justice Holmes stated for this Court in *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393 (1922):

> "The protection of private property in the Fifth Amendment . . . provides that it shall not be taken for [public] use without compensation . . . . When this seemingly absolute protection is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears. *But that cannot be accomplished in this way under the Constitution of the United States. . . . We are in danger*

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[4] *See, e.g.,* Eutaw Enterprises, Inc. v. City of Baltimore, 241 Md. 686, 217 A. 2d 348 (1966) (check cashing service); Village of Oak Park v. Gordon, 32 Ill. 2d 295, 205 N.E. 2d 464 (1965) (boarding house); Jones v. City of Los Angeles, 211 Cal. 304, 295 P. 14 (1930) (mental hospitals); State ex rel. Dema Realty Co. v. Jacoby, 168 La. 752, 123 So. 314 (1929) (drug store); State ex rel. Dema Realty Co. v. McDonald, 168 La. 172, 121 So. 613 (1929), *cert. denied,* 280 U.S. 556 (1929) (grocery store); City of Los Angeles v. Gage, 127 Cal. App. 2d 442, 274 P. 2d 34 (1954) (plumbing supply business and "nonconforming buildings").

of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." Id. at 415 416 (Emphasis added).

II. Even if use of the amortization technique is not per se constitutionally impermissible, this Court should delineate the standards to be employed in determining when it may be utilized.

Amicus' position is that the amortization technique itself amounts to a taking of private property and is never constitutionally permissible, absent the payment of just compensation. Even if this Court were to conclude that amortization may properly be employed in some land use contexts, this would still not cure the vices of the decision below. By failing to either consider or indicate any limits on the use of the technique, the Tenth Circuit's decision invites the conclusion that amortization is constitutionally permissible regardless of the particular circumstances in which it is employed.

For example, wholly different constitutional considerations are raised when amortization is applied to property capable of conforming to the new requirements than when it is applied to property wholly incapable of so conforming, a distinction deemed important in several other decisions.[5] *See, e.g., Eutaw Enterprises, Inc. v. City of Baltimore,* 241 Md. 686, 217 A. 2d 348 (1966); *Town of Hempstead v. Romano,* 33 Misc. 2d 315, 226 N.Y.S. 2d 291 (1962); *City of Los Angeles v. Gage,* 127 Cal. App. 2d 442, 274 P. 2d 34 (1954). In the former situation, the operative effect of the device is more confidently viewed as regulation while the effect in the latter situation is clearly confiscation.

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[5] The District Court specifically found that the petitioners' property was incapable of conforming to the new requirements of the Denver ordinance. Art Neon Co. v. City and County of Denver, 357 F. Supp., 466, 473 (D. Colo. 1973).

Similarly, no attempt was made to distinguish between amortization which permits relocation of the nonconforming use elsewhere within the municipality, and amortization which does not.[6] Other courts have viewed this distinction to be of critical constitutional significance. *See, e.g., National Advertising Co. v. County of Monterey,* 1 Cal. 3rd 875, 83 Cal. Reptr. 577, 464 P. 2d 33 (1970); *Harbison v. City of Buffalo,* 4 N.Y. 2d 553, 176 N.Y.S. 2d 598, 152 N.E. 2d 42 (1958); *Grant v. Mayor and City Council of Baltimore,* 212 Md. 301, 129 A. 2d 363 (1957); *Town of Hempstead v. Romano, supra*; *City of Los Angeles v. Gage, supra.*

Finally, the Tenth Circuit viewed amortization as "no more than notice to the owner and user of the sign that they have a period of time to make whatever adjustments or other arrangements they can . . . so used it contains no connotation of compensation or a requirement therefor." This anomalous view of amortization's function is contrary to almost every decision on the subject. *See, e.g., National Advertising Co. v. County of Monterey, supra; Livingston Rock & Gravel Co. v. County of Los Angeles,* 43 Cal. 2d 121, 272 P. 2d 4 (1954); *City of La Mesa v. Tweed & Gambrell Planing Mill,* 146 Cal. App. 2d 762, 304 P. 2d 803 (1957); *City of Los Angeles v. Gage, supra,* all of which required that the amortization period be "commensurate with the investment involved". Other criteria, all reflecting some relationship to value, investment, or remaining economic life, have also been enunciated by the courts. *See, e.g., Swain v. Bd.*

[6] Again, the District Court found that relocation was not an alternative open to the petitioners under the Denver ordinance.

[7] It should be noted that ordinances resulting in inability to relocate or in total prohibition have been invalidated by the courts. *See, e.g.,* Appeal of Girsch, 437 Pa. 237, 263 A. 2d 395 (1970); Norate Corp. v. Zoning Hearing Bd. of Adjustment, 417 Pa. 397, 207 A. 2d 890 (1965); Bzovi v. City of Livonia, 350 Mich. 489, 87 N.W. 2d 110 (1957); People ex rel. Trust Co. of Chicago v. Village of Skokie, 408 Ill. 397, 97 N.E. 2d 310 (1951); Varney & Green v. Williams, 155 Cal. 318, 100 P. 867 (1909); Beaver Gasoline Co. v. Zoning Hearing Bd., 1 Pa. Cmwlth. 458, 275 A. 2d 702 (1971), *vacated* 285 A. 2d 501 (1972).

of Adjustment of University Park, 433 S.W. 2d 727, 734 (Texas Ct. of Civ. App. 1968); *City of La Mesa v. Tweed & Gambrell Planing Mill, supra*; *City of Los Angeles v. Gage, supra.*

It is clear that amortization draws its sole possible justification from the principle that recovery of investment (during the amortization period) is a constitutionally adequate substitute for just compensation. The Tenth Circuit's view of the Denver ordinance would permit an amortization period bearing no relationship to the real economic life of the amortized property. Indeed, it would, taken to its logical conclusion, permit no amortization period at all. By disregarding the very rationale upon which amortization schemes have been based, the Tenth Circuit has opened the door to far more radical forms of municipal regulation. *Cf. City of Santa Barbara v. Modern Neon Sign Co.,* 189 Cal. App. 2d 188, 11 Cal. Reptr. 57 (1961).

CONCLUSION

The Tenth Circuit's decision represents an almost unlimited constitutional sanction for a land use allocation technique of increasing popularity. Its radical erosion of the just compensation requirements of the Fifth Amendment, viewed in the light of its probable consequences, clearly presents important and significant questions of Federal constitutional law that should be resolved by this Court. It is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

CERTIFICATE OF SERVICE

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